IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2007

STATE OF TENNESSEE v. MELINDA JO FISHER SPAKES

Appeal from the Circuit Court for Rhea County
No. 15594 J. Curtis Smith, Judge

No. E2006-00573-CCA-R3-CD - Filed August 21, 2007

The defendant, Melinda Jo Fisher Spakes, appeals the denial of judicial diversion or alternative sentencing following her "best-interests" pleas to two counts of misdemeanor child neglect. *See* T.C.A. § 39-15-401 (1997). After review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Howard L. Upchurch, Pikeville, Tennessee, for the Appellant, Melinda Jo Fisher Spakes.

Robert E. Cooper, Jr., Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; James Michael Taylor, District Attorney General; and William Dunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The facts underlying the child-neglect conviction offenses are drawn exclusively from the presentence investigation report in the record. That report recites,

> The victims in this case . . . were nine year old twins at the time of the offense. Their mother died in 1997, when they were six years old. The father, Billy Spakes, was remarried in February 1999 to [the defendant]. The couple lived in Athens, TN with the girls for six months, but after that the family moved in with [the defendant's] parents in Evensville. While in Evensville, Billy Spakes was having to work long hours at the trucking firm he worked for in Cleveland, and left the raising of the children to [the defendant] and her mother, Susie Fisher. But when he lost his job in June of 2000, Mr. Spakes began spending more time at home and was able to observe his wife and mother-in-law's discipline of his children, which had become

increasingly severe over time. Mr. Spakes observed that the discipline had turned into abuse, and took the children to the home of Robert and Rhonda Bell in Athens on 8/9/00; he signed over custody to the couple on 8/10/00.

Upon noticing bruises on the children, the Bells took the children to Athens Pediatrics on 8/11/00, and a referral was made to the Department of Children's Services. The physician found multiple contusions and abrasions on the bodies of both of the girls. The children were interviewed at the Meigs County DCS Office on 8/12/05. Both children reported the following abuse by [the defendant] and [the defendant's mother]: Being forced to urinate on themselves after not being allowed to go to the bathroom; made to stay in the car in parking lots while the rest of the family were eating in a restaurant; whipping on the back, legs, arms and head with a stick 1/8 inch thick; going without food for up to 6 days, with 2 sips of broth allowed 3 times a day (they were told that this was to "cleanse their bodies"); being forced to use the bathroom outside in a bucket; being forced to take baths outside with a garden hose; having their eyes taped shut if they did not get to sleep by a certain time; being made to spend all day and all night outside, if they wet in their pants. [One of the victims] had her legs and arms taped together at night. These events occurred after summer break began in 2000.

Billy Spakes was interviewed at the DCS office on 8/15/00. He stated that he witnessed all of the abuses that the girls described in their interview. [The defendant] was interviewed at the DCS office in Dayton on 8/25/00. She admitted to whipping the children with her hands, a belt, and a switch. She admitted to putting duct tape on the children's hands "a couple of times," and putting tape across [one of the victim's] mouth to keep her from arguing; she also admitted to putting the children outside, "but not over night."

[The victims] were re-interviewed by DCS on 3/28/01, and confirmed most of the statements that they had previously made. [One victim] added that she saw [the other victim] struck with a ball bat by [the defendant]. [The victim] also stated that [the defendant] put a dog cage in the family vehicle, a Chevrolet Blazer, behind the seat. The dogs would not be put in the cage, and that is where the children would ride. [One of the victims] confirmed in the interview that she had been struck with a metal ball bat on the head, shoulder, back, legs and hands. A CT scan was performed on [one of the victims] on 1/15/01, and it was discovered that she had a mild vertebral body compression of T-7, "consistent with older fracture and could have

> occurred six months ago," according to Athens Medical Center records. The CT scan performed on [the other victim] was unremarkable.

The Rhea County grand jury returned separate indictments in 2000 and 2001, which were consolidated in 2002, charging the defendant with two counts of misdemeanor child abuse and two counts of misdemeanor child neglect. The grand jury also indicted the defendant's mother on two counts of misdemeanor child neglect. The indictment alleged that the acts of child neglect and abuse occurred within a 39-day period of time "between the 27th day of June, 2000 and the 4th day of August, 2000."

On June 29, 2005, the defendant entered a best-interests plea[1] to the child neglect charges. The record before us does not contain a transcript of the plea submission hearing.

The trial court conducted a sentencing hearing on February 28, 2006, to consider the defendant's request for placement on judicial diversion, *see* T.C.A. § 40-35-303(2006), or a probationary sentence. The State advocated an incarcerative sentence and relied on the presentence report and a "victim-impact" statement handwritten by the twins' aunt. Notably, the victim-impact statement does not describe how the defendant's neglect affected the twins; rather, the aunt accuses the defendant of attempting "to kill [her] nieces," and the aunt complains that she lost two days of work in connection with the legal proceedings. Prosecution counsel advised the court,

> Oddly enough, from my standpoint, I've talked to the girls, they have rebounded well and are doing well now, and I asked for them to come here on several occasions that this was set before[,] and they were going to[,] and the last time the grandmother said that they were so upset about it they would just rather not show[;] they just don't want to deal with this lady again or see her again.

The defendant testified at sentencing that she and Mr. Spakes separated in 2000, when she was 24 years old, and the parties were divorced in 2002. The defendant lived with her parents, and after she was charged, she enrolled in and completed a program to obtain a nursing license. For the past three years she had been working at Methodist Hospital in Oak Ridge as a clinical laboratory assistant and had been promoted to senior clinical laboratory assistant. Her employment was full time, and she earned $11.22 an hour, having started at $7 an hour.

The trial court found that the circumstances of the offenses were "especially horrifying, shocking, [and] reprehensible" and that the nature of the offense outweighed all other factors, including a "commendable" work history. The trial court further stated, "I'm just not moved

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[1] Pursuant to a "best interests" plea, an individual may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if she is unwilling or unable to admit her crime or protests her innocence. *See State v. Allen*, 10 S.W.3d 286, 291 (Tenn. Crim. App. 1999); *Dortch v. State*, 705 S.W.2d 687, 688 (Tenn. Crim. App. 1985).

by [the defendant's] comments that she was overwhelmed with raising two children." The court sentenced her to serve 11 months and 29 days in the Rhea County Jail.

The defendant filed a timely notice of appeal, challenging the denial of judicial diversion and her sentence.

I. Judicial Diversion

"Judicial diversion" is a reference to the provision in Tennessee Code Annotated section 40-35-313(a) for a trial court's deferring proceedings in a criminal case. See T.C.A. § 40-35-313(a)(1)(A) (2006). The result of such a deferral is that the trial court places the defendant on probation "without entering a judgment of guilty." *Id*. To be eligible or "qualified" for judicial diversion, the defendant must plead guilty to, or be found guilty of, an offense that is not "a sexual offense or a Class A or Class B felony," and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id*. § 40-35-313(a)(1)(B)(i). Diversion requires the consent of the qualified defendant. *Id*. § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *See State v. Bonestel*, 871 S .W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). The statute states that a trial court may grant judicial diversion in appropriate cases. T. C. A. § 40-35-313(a)(1)(A) (2006) (court "may defer further proceedings"). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

"Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion." *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

> [T]he defendant's criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

Id. at 343-44; *see State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Moreover, the record must reflect that the court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id*.

On appeal, this court must determine whether the trial court abused its discretion in failing to grant judicial diversion. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168. Accordingly, when a defendant challenges the denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

Although the trial court did not state the relevant factors which it considered in denying diversion verbatim as listed in *Cutshaw*, the record indicates that those factors were considered in the determination. The trial court stated that it considered the evidentiary hearing evidence, the presentence report, the nature and circumstances of the criminal conduct, the defendant's background, social history, mental and physical condition, and potential for rehabilitation. The trial court found all the facts from the presentence report and stated that the defendant's conduct was "shocking and reprehensible." Thus, the court denied judicial diversion. Based on the trial court's findings and ruling, we cannot hold that the court abused its discretion in denying judicial diversion.

II. Sentencing

The defendant also contends that the trial court erred because the court denied probation and alternative sentencing.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). This presumption is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In misdemeanor sentencing, the sentencing court is afforded considerable latitude. *See, e.g., State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999), *perm. app. denied* (Tenn. 2000). A separate sentencing hearing is not mandatory in misdemeanor cases, but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. *See* T.C.A. § 40-35-302(a) (2006). Misdemeanor sentences must be specific and in accordance with the principles, purpose, and goals of the Criminal Sentencing Reform Act of 1989. T.C.A. §§ 40-35-104, -302 (2006); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. Generally, a percentage of not greater than 75 percent of the sentence should be fixed for a misdemeanor offender; however, a DUI offender may be required to serve 100 percent of his or her sentence.

Palmer, 902 S.W.2d at 393-94. A convicted misdemeanant has no presumption of entitlement to a minimum sentence. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). The misdemeanor sentencing statute requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served "in actual confinement" prior to "consideration for work release, furlough, trusty status and related rehabilitative programs." T.C.A. § 40-35-302(d) (2006); *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998).

The defendant in this case takes issue with the trial court's determination that the defendant must serve her sentence in jail and suggests that the court failed to give proper consideration to the relevant statutory principles and considerations relative to sentencing.

First, we note that the defendant did not include a transcript of the plea hearing in the record, risking us presuming the trial court's determinations to be correct; however, we believe the record before us justifies the trial court's sentencing.

A. Probation

We note that the defendant was statutorily eligible to serve a suspended sentence. *See* T.C.A. § 40-35-303(a) (2006). The determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish her "suitability for full probation as distinguished from [her] favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b) (2006); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9.

Here, the trial court solely based the denial of probation on the nature and circumstances of the offense. The court found that the defendant committed all the "reprehensible" acts listed in the presentence report. The evidence in the record supports the trial court's ruling, and the defendant failed to carry her burden of showing that probation would "subserve the ends of justice and the best interest of both the public and the defendant." *See State v. Amanda Lee Sutton*, No. E1999-00920-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Knoxville, Oct. 2, 2000) (upholding the denial of probation for a child abuse conviction despite the young defendant's positive factors, including lack of criminal record, living with parents, and employment).

B. Alternative Sentencing

The defendant claims that the trial court erred in denying alternative sentencing, and she complains that the trial court did not properly consider mitigating factors in determining whether to deny alternative sentencing. We discern that the trial court did consider these factors, for the

record states the court considered "this lady's background and social history, her present condition, both physical and mental, the nature and characteristics of the criminal conduct involved and her potential for rehabilitation." The trial court also commended the defendant's successful completion of education and employment since committing the crimes.

The defendant is a standard, Range I offender convicted of a Class A misdemeanor. As such, she is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. *See* T.C.A. § 40-35-102(6) (2006). However, this presumption does not entitle all offenders to alternative sentences; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The presumption of favorable candidacy for alternative sentencing in general, which is applicable in the present case, may be overcome, *inter alia*, by showing that confinement is necessary to avoid depreciating the seriousness of the offense. T.C.A. § 40-35-103(1)(B).

The nature and characteristics, or circumstances, of the offense have long been recognized as grounds for denying any probation. *Stiller v. State*, 516 S.W.2d 617, 621 (Tenn. 1974); *Powers v. State*, 577 S.W.2d 684, 685-86 (Tenn. Crim. App. 1978); *Mattino v. State*, 539 S.W.2d 824, 828 (Tenn. Crim. App. 1976). The nature and circumstances of the offense may serve as the sole basis for denying alternative sentencing when they are "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree; and it would have to be clear that, therefore, the nature of the offense, as committed, outweighed all other factors . . . which might be favorable to a grant of [alternative sentencing]." *State v. Travis*, 622 S.W.2d 529, 534 (Tenn. 1981); *see also State v. Cleavor*, 691 S.W.2d 541, 543 (Tenn.1985), *overruled on other grounds by Hooper*, 29 S.W.3d at 9. Significantly, "[t]his standard has essentially been codified in the first part of T[ennessee] C[ode] A[nnotated] [s]ection 40-35-103(1)(B) which provides for confinement if it 'is necessary to avoid depreciating the seriousness of the offense.'" *State v. Hartley*, 818 S.W.2d 370, 375 (Tenn. Crim. App.), *perm. app. denied* (Tenn. 1991).

The record in the present case supports a finding that the circumstances of the offense were especially reprehensible. The record supports the trial court's conclusion that the conduct outweighed all other commendable positive factors. Thus, affording due latitude to the trial court's misdemeanor sentence, we affirm the trial court's denial of alternative sentencing. *See Amanda Lee Sutton*, slip op. at 8.

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JAMES CURWOOD WITT, JR., JUDGE